Supreme Court, U.S.
FILED
APR 4 1996
CLERK

(2)

No. 95-1422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FERRELL SECAKUKU, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE,
Petitioner,

v.

ALBERT HALE, PRESIDENT OF THE NAVAJO NATION, FOR AND ON BEHALF OF THE NAVAJO NATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

HERB YAZZIE
ATTORNEY GENERAL
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, Arizona 86515
(602) 871-6343
Of Counsel

TERRY E. FENZL
COUNSEL OF RECORD
CRAIG W. SOLAND
JOHN W. ROGERS
SHIRLEY A. KAUFMAN
BROWN & BAIN, P.A.
Post Office Box 400
Phoenix, Arizona 85001
(602) 351-8000

26 pp

QUESTION PRESENTED

The Hopi Tribe claims an interest in a part of the Navajo Reservation, the sole basis of that claim being a phrase in a 1934 Act of Congress mentioning "other Indians as may already be located thereon." The Hopi Tribe prayed that a portion of the Navajo Reservation be partitioned to the Hopi Tribe, the sole basis for that relief being a 1974 Act of Congress. After a lengthy trial, the district court examined the legislative history and purpose of each Act, then applied the plain meaning of the 1934 Act to adjudicate the Hopi claim and the plain meaning of the 1974 Act to partition the land. The court of appeals affirmed in relevant part.

The issue presented by the Hopi Tribe's petition is whether the district court and the court of appeals erred in not applying principles enunciated by the Indian Claims Commission in its adjudication of unrelated "aboriginal title" claims and whether the result in this case is inconsistent with, or should be controlled by, the result in another litigation between these two tribes involving a separate reservation established in 1882 by a presidential executive order that had a different history, different purpose and different language than the 1934 Act.

TABLE OF CONTENTS

COUNTER STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

REASONS FOR DENYING A WRIT 7

A. This case was decided in the lower courts on the basis of intensive factual determinations not appropriate for this Court's attention. 7

B. This case involves two unique federal statutes that apply only to the Navajo Reservation and are germane only to the litigants in this action 10

1. The concept of "aboriginal title" does not apply to this case 10

2. The decision of the district court in *Healing v. Jones* does not support the Hopi argument 15

3. The lower courts properly applied the plain meaning of the 1934 Act 16

4. The final judgment of the district court was fair, equitable, just, and consistent with the plain meaning of the 1974 Act 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Absentee Shawnee Tribe v. Kansas,
862 F.2d 1415 (10th Cir. 1988), *cert. denied*,
490 U.S. 1046 (1989) 8

Chippewa Indians v. United States,
301 U.S. 358 (1937) 11

Graver Tank Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949) 18

Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) ..... *passim*

Hopi Tribe v. United States, 23 Ind. Cl. Comm. 277 (1970), *reh'g denied*, 31 Ind. Cl. Comm. 16, *aff'd*, No. 13-74 (Ct. Cl. January 31, 1976) 13

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 11

Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835) ... 14

Navajo Tribe v. New Mexico, 809 F.2d 1455 (10th Cir. 1987) 12

Northern Cheyenne Tribe v. Hollowbreast,
349 F. Supp. 1302 (D. Mont. 1972), *aff'd*,
425 U.S. 649 (1976) 11

Omaha Indian Tribe v. Tract I - Blackbird Bend Area, 933 F.2d 1462 (8th Cir.), *cert. denied*, 502 U.S. 942 (1991) 7

Rogers v. Lodge, 458 U.S. 613 (1982) 18

Sekaquaptewa v. MacDonald, 449 U.S. 1010 (1980) 7

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) 11, 12

United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941) 11

STATUTES

The Act of June 14, 1934, 48 Stat. 960 ..... *passim*

The Act of December 22, 1974, 25 U.S.C. § 640d ..... *passim*

OTHER

A Proposed Bill to Define the Exterior Boundaries of the Navajo Reservation in Arizona: Hearing Before the Senate Comm. on Indian Affairs, 72d Cong., 2d Sess. (1932) 1, 13

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) 11

Margaret H. Pierce, *The Work of the Indian Claims Commission*, 63 A.B.A.J. 227 (1977) 12

Navajo Indian Reservation: Report of H.J. Hagerman, S. Doc. No. 64, 72nd Cong., 1st Sess. (1932) 2

NEW CENTURY DICTIONARY OF THE ENGLISH LANGUAGE (1927) 17

WEBSTER'S NEW INT'L DICTIONARY (1930) 16

BRIEF FOR THE RESPONDENT IN OPPOSITION

COUNTER STATEMENT OF THE CASE

From 1868 until 1934, the Navajo Reservation in Arizona grew as a patchwork of reservations created by an 1868 treaty and several statutes and temporary executive order withdrawals. [Pet. App. 267a-268a] In 1934, Congress consolidated, enlarged and confirmed the boundary of the Navajo Reservation for two reasons: Congress wanted to solidify control of land needed to support the Navajo people and the livestock on which they depended for subsistence, and the neighboring ranchers and local governments wanted to clarify ownership of "checkerboard" lands within Navajo territory and reach a clear, final delineation of Navajo lands.[1]

In 1934, as today, most of the Hopi people lived on the Hopi Reservation, a separate reservation created by a presidential executive order in 1882.[2] However, as Congress learned

---

[1] Sen. Carl Hayden, the sponsor of the 1934 Act, explained the rationale of the legislative precursor of the Act: "The chief object of the bill is the elimination of the 'checkerboard' system of land control. ... Since 1868 the Navajo Indians in Arizona have increased in numbers. ... The bill conserves for these [Navajo] Indians a domain sufficient to support their flocks and herds." [Ex. 2469]

[2] *A Proposed Bill to Define the Exterior Boundaries of the Navajo Indian Reservation in Arizona: Hearing Before the Senate Comm. on Indian Affairs*, 72d Cong., 2d Sess. 10 (1932) (Ex. 2431) (Sen. Hayden, the 1934 Act's sponsor: "[The Hopis] are all [inside the 1882 Reservation] except a small settlement outside of the area over at a place called Moencopi."). When (continued...)

during the effort that led to the 1934 Act,[3] approximately 400 Hopi people lived on the Navajo Reservation in a village called Moenkopi. [Pet. App. 48a] In the course of the legislative process, the Senate appointed a special commissioner, who thoroughly investigated the situation at Moenkopi and recommended to Congress in 1932 that 35,200 acres adjacent to that village be set aside for the Hopis.[4]

As noted by the circuit court: "The 1934 Act is concerned primarily with Navajo affairs. ... The only mention of the Hopis in the 1934 Act is the provision excepting the 1882 reservation from the Act's effects." [Pet. App. 256a] Nevertheless, during that legislative process, Congress considered specific proposals that would have defined specific areas for the Hopis at Moenkopi and resolved various disputes between Hopis and Navajos on the Hopi Reservation.[5] When those efforts were frustrated by internal dissension among the Hopis, Congress elected not to try to solve all issues in a single

---

[2] (...continued)
the 1882 executive order reservation was created, much of that area was already exclusively occupied by Navajo people. *See Healing v. Jones*, 210 F. Supp. 125, 144-45 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). Nevertheless, the Hopi Tribe typically refers to the entire 1882 area as the "Hopi Reservation." That name is sometimes used herein without disrespect to the many Navajo families for whom that area is, and always has been, their sacred ancestral homeland.

[3] The Act of June 14, 1934, 48 Stat. 960, entitled "An Act [t]o define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes," is referred to herein as "the 1934 Act." The portion of the Navajo Reservation involved in the litigation is sometimes referred to as "the 1934 Reservation." [Pet. App. 295a]

[4] *Navajo Indian Reservation: Report of H. J. Hagerman*, S. Doc. No. 64, 72d Cong., 1st Sess. 47-49 (1932) (Ex. 2388).

[5] *Id.*

stroke and instead returned to the primary task of declaring the boundary of the Navajo Reservation. Ultimately, the 1934 Act recognized the right of Hopi people to remain "located" at Moenkopi and specified that the Act would not attempt to resolve conflicting claims to the Hopi Reservation:

> That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [legal description omitted]. All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal *for the benefit of the Navajo and such other Indians as may already be located thereon*; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

The 1934 Act, § 1 (emphasis added). [Pet. App. 295a-296a]

Several decades later, the Hopi Tribe took the phrase "other Indians as may already be located thereon" out of its historical context and stretched it beyond recognition by asserting that the 400 Hopi individuals who resided in the village of Moenkopi were "located" on more than *3 million* acres of the Navajo Reservation. In other words, the Hopi Tribe argued—and continues to argue to this Court—that each Hopi man, woman and child residing in Moenkopi in 1934 was

actually "located" on 7,500 acres.[6] In 1974, Congress authorized the two tribes to resolve that issue in this litigation.[7]

A bifurcated trial took place in 1989-90 and 1992, after which the district court partitioned more than 61,000 acres to the Hopi Tribe, which is almost twice as much as the special commissioner recommended to Congress in the early 1930s.[8] The court of appeals largely affirmed, remanding only for further proceedings as to certain Hopi religious sites.

As a final note, the Hopi petition features an unfortunate, venomous "background" statement that begs to be

---

[6] The Hopi Tribe argues that some of the Hopis living on the Hopi Reservation sometimes used parts of the Navajo Reservation. However, in *Healing v. Jones*, the court held that Hopi use of the Hopi Reservation was substantially confined to "District 6," a diamond-shaped area of about 631,000 acres in the middle of the 1882 executive order area [210 F. Supp. at 133, 173], and in this case the district court found as a matter of fact that Hopis from the Hopi Reservation did not make substantial use of the areas outside the boundaries of the 1882 executive order reservation. [Pet. App. 71a-77a, 99a-100a & n.108, 116a, 119a]

[7] The Act of December 22, 1974, 25 U.S.C. § 640d-7, referred to herein as "the 1974 Act," waived sovereign immunity of the two tribes for the limited purpose of this litigation, conferred jurisdiction on the district court, specified the remedies the district court could employ, and decreed the standards applicable to those remedies. [Pet. App. 301a]

[8] The Hopi Tribe complains [Pet. 7] that 61,000 acres are less than one percent of 3 million acres, which is apparently meant as criticism of the district court. If anything, however, that statistic merely underscores the audacity of the Hopi Tribe's claim. The Hopi Tribe states that there are 300,000 members in the Navajo Nation and 8,000 in the Hopi Tribe, and that the Navajo Reservation consists of 17 million acres and the Hopi Reservation amounts to 1.6 million acres. The Hopi Tribe's own figures show that Hopi land per capita is already almost *four times* as much as that of the Navajo (200 acres per Hopi, compared to 56.7 acres per Navajo), even though Hopis are concentrated in villages and Navajos live in disbursed settlements so they can best use the land to support their livestock and crops.

corrected, then forgotten. The Hopi petition [at 3] drags out hoary half-truths about alleged Navajo "depredations" during a prior century, citing the *Healing* decision. However, as the Hopi Tribe well knows, the discussion in *Healing* relates *only* to events that may or may not have happened *more than a hundred years ago* on *different land*, involving *different individuals* than those who were living in the Moenkopi area in the 1930s. To the extent the Hopi petition attempts to taint all Navajo people with an image of lawlessness based on allegations about a few individuals long deceased, it is a generalized attack on an ethnic group of the sort that must not be tolerated anywhere in our society and is beneath the dignity of this Court.

SUMMARY OF ARGUMENT

This case is determined entirely by two unique federal statutes that apply *only* to the Navajo Reservation and are germane *only* to the litigants in this action: First, the Hopi claim arises solely under the 1934 Act, and the claim must be resolved by applying the language of that Act, as the district court and the court of appeals appropriately did. Second, the jurisdiction and authority of the district court in this unique case spring from the 1974 Act, which required that any partitioning be made on the basis of "fairness and equity." The rulings of the district court under both statutes are grounded on detailed findings of fact concerning Navajo and Hopi land use. In separate trials, the district court examined historical land use in the 1930s to determine where Hopis were "located" when the 1934 Act was passed, then studied more current land uses to determine the fairness and equity of various alternative partition lines.

The Hopi Tribe claims that "the Ninth Circuit's judgment is contrary to decisions of this Court and other federal courts." [Pet. 2] That is not correct. No court, including this Court, has interpreted or applied the 1934 Act or the relevant provisions of the 1974 Act, other than in the course of this

particular litigation. Hence, no decision exists to which the court of appeals' judgment could be contrary. The Hopi Tribe errs by measuring the consistency of the court of appeals' judgment against cases interpreting *other* congressional acts or executive orders—each with its own unique history, purpose and language—that established *other* Indian reservations. The Hopi Tribe cites no authority for the proposition that such a comparison is appropriate.

The Hopi Tribe focuses on the opinion of a three-judge court in the District of Arizona in *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963), and argues that the court of appeals in this case impermissibly strayed from the teachings of that decision. That argument is faulty for several reasons. Although *Healing* involved the same parties (the Navajo Nation and the Hopi Tribe), it was based on particular facts that related to a different reservation—the Hopi Reservation, created for a different purpose pursuant to an 1882 executive order containing different granting language than that used by Congress in the 1934 Act. In any event, to the extent this case and *Healing* can be compared at all, they are in harmony, and the Hopi Tribe simply misconstrues the *Healing* opinion to attempt to manufacture a conflict where none exists.

Finally, the Hopi Tribe asserts that the court of appeals' judgment represents a "profound unfairness to the Hopi Tribe." [Pet. 2] To the contrary, the court of appeals not only applied the 1934 and 1974 Acts correctly, it affirmed a result that is eminently fair by any standard. The Hopi Tribe received every bit of land on the 1934 Reservation "used in any significant way" by Hopis at the time of the 1934 Act, *and* "all areas currently used" by Hopis. [Pet. App. 203a]

REASONS FOR DENYING A WRIT

A. This case was decided in the lower courts on the basis of intensive factual determinations not appropriate for this Court's attention.

Clearly, the key phrase in the 1934 Act is "located thereon," which the district court fairly and properly construed as follows:

> The Court finds that the use by Hopi Indians must be substantial and sufficiently intensive in order to create a property interest in the 1934 Reservation, though the use does not have to be for subsistence purposes. Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. However, since seasonal use is pervasive in Indian land use patterns, and indeed, necessary in the harsh environment of the 1934 Reservation, substantial seasonal use is sufficient for this Court to find occupation or use of the land.

[Pet. App. 45a-46a] The court of appeals affirmed. [Pet. App. 9a-10a ("[T]he district court correctly construed the statutory phrase 'located' in this statute.")] The Hopi Tribe's dissatisfaction with this outcome does not warrant consideration by this Court.[9]

---

[9] The Hopi Tribe argues that this Court should grant certiorari merely because this case involves Indian sovereigns and Indian land, but that is not a sufficient reason to grant review. In 1980, this Court declined to grant a writ in this very case [*Sekaquaptewa v. MacDonald*, 449 U.S. 1010 (1980)] and numerous other examples exist where certiorari has been denied in cases involving Indian sovereigns and Indian land. *E.g.*, *Omaha Indian Tribe v.*

(continued...)

The Hopi Tribe mischaracterizes the district court's decision when it asserts that "[t]raditional land uses" such as "the gathering of plants for food and medicine, the collection of materials for tools and crafts, hunting, and similar practices were *disqualified*." [Pet. 6-7 (emphasis added)] In truth, the district court did *not* "disqualify" such "traditional land uses," but instead weighed the evidence regarding those activities and found that the Hopis had not carried their burden of proving that they had been "located" at the sites of such transitory activities in 1934. [Pet. App. 117a-120a] For example, in reviewing the evidence of the gathering of "greens, herbs, vegetables, fruits, seeds and berries," the district court found as a matter of fact that:

> the evidence shows most of the plant gathering took place close to Moenkopi and that gathering outside of this area was irregular and often depended on where a person was traveling.

[Pet. App. 117a] Similarly, the district court reviewed the evidence of Hopi hunting and found as a matter of fact that:

> Evidence indicates, however, that by 1934, rabbits were the only wild game hunted by the Hopis, and many rabbits were found in the Moenkopi vicinity.

[Pet. App. 120a-121a] Overall, the district court provided exhaustive citations to the voluminous record in considering the minutiae of Hopi land use to determine where the Hopis truly were "located." [Pet. App. 117a-122a]

---

[9] (...continued)
Tract I - Blackbird Bend Area, 933 F.2d 1462 (8th Cir.), *cert. denied*, 502 U.S. 942 (1991); *Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415 (10th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989).

The Hopi Tribe asserts, without a single citation to the record, that:

> Uncontradicted evidence showed that Hopis both from Moenkopi and from the mesas inside the 1882 Reservation made regular use of the 1934 Reservation for a variety of traditional activities, such as residence, farming, grazing, gathering eagles for ceremonial purposes, visiting shrines, hunting, gathering plants, and obtaining materials for economic and religious purposes. Further uncontradicted evidence showed that these activities were, and continue to be, essential to the Hopi way of life.

[Pet. 5] To the contrary, the evidence did not show "regular use" outside the vicinity of Moenkopi. The evidence showed, at most, occasional episodes of Hopi use that were sporadic, infrequent, fleeting and inconsequential, from which the district court sensibly and correctly concluded that Hopis were not "located" at the far flung places of such activities, as the Congress intended the word "located" to be used in the 1934 Act.[10]

---

[10] For example, the district court found no basis for Hopi use claims based on: *gathering ceremonial plants*, which (i) "was sporadic and at irregular intervals," and (ii) mostly occurred around the vicinity of Moenkopi and outside the 1934 Reservation [Pet. App. 116a]; *ceremonial hunting*, which was not intensive, and where by the 1930s, Moenkopi Hopis "were no longer hunting foxes and coyotes," and the "deer were almost extinct in LMU3" [Pet. App. 116a-117a]; *subsistence hunting*, which by 1934 was limited to rabbits, many of which "were found in the Moenkopi vicinity" [Pet. App. 120a-121a]; *gathering edible plants*, which mostly occurred "close to Moenkopi" and where "gathering outside [that] area was irregular and often depended on where a person was traveling" [Pet. App. 117a]; *gathering pinon nuts*, where (i) pinons were only gathered "once a year," (ii) "because pinons ripen in an area only once every five to seven years, Hopis went to different places every year," and (iii) "pinon nuts were rarely found and 'unusual' in the Hopi diet"

(continued...)

B. This case involves two unique federal statutes that apply only to the Navajo Reservation and are germane only to the litigants in this action.

1. The concept of "aboriginal title" does not apply to this case.

The Hopi Tribe's current reliance on "aboriginal title" is puzzling: From the outset of this litigation, the Hopi Tribe consistently and repeatedly asserted that its claim was based on "recognized title," *not* "aboriginal title."[11] The lower courts agreed. [Pet. App. 12a (the court of appeals noted that "the Hopis are not litigating their aboriginal title to these lands, but rather the recognized title conferred on them by the 1934 Act"); Pet. App. 44a (the district court found that "[t]he Hopi Tribe's claims in this case are based on *recognized title* granted by the 1934 Act")]

An Indian tribe acquires "recognized title" to a parcel of land when the United States government conveys that land by

---

[10] (...continued)
[Pet. App. 118a]; and *gathering firewood*, which (i) by 1934, "had become scarce" within the 1934 Reservation and gathering "was waning," (ii) mostly took place outside the 1934 area, and (iii) was often replaced by "alternative forms of fuel, such as brush, greasewood, and corncobs from Hopi fields" [Pet. App. 119a-120a].

[11] In a 1977 brief, the Hopi Tribe stated: "The case at bar is *not based on aboriginal interests*. The subject of this action is the legal rights and interests *created* for the Hopi and Navajo Tribes in lands outside the 1882 Reservation *by the 1934 Act*." [Hopi Reply Memorandum (6/3/77) at 6 (emphasis added)] At the same time, the Hopi Tribe argued—contrary to its current position—that the decisions of the Indian Claims Commission "are poor precedents as a result of the vastly differing issues and other policy considerations involved in apportioning money judgments between Indian groups." [Hopi Response to Navajo Motion for Partial Summary Judgment (5/16/77) at 55]

treaty, executive order or statute. Congress has broad discretion in conveying "recognized title" to an Indian tribe,[12] and Congress exercised that discretion in the 1934 Act. When "recognized title" has vested, it cannot be taken from the tribe without compensation. *E.g.*, *Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937). In contrast, "Indian title" (also known as "aboriginal title") is a right of occupancy that is freely extinguishable by the United States government. Congress regularly extinguished occupancy rights by creating Indian reservations that were smaller than a tribe's aboriginal territories.[13]

The "unbroken line of cases" on which the Hopi Tribe relies [Pet. 8] arises from the specialized work of the Indian Claims Commission, a unique tribunal created in 1946 to disburse money to Indian tribes to compensate them for the loss of their traditional lands as European Americans marched across this continent. [Pet. App. 11a-12a] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 491-92 (1982 ed.)

---

[12] *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); *Northern Cheyenne Tribe v. Hollowbreast*, 349 F. Supp. 1302, 1306-07 (D. Mont. 1972), *aff'd*, 425 U.S. 649 (1976) ("Congress has plenary power to deal with Indian affairs and property.").

[13] *See, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 288-91 (1955) ("[Indian title] means mere possession not specifically recognized as ownership by Congress. ... This is *not a property right* but amounts to a right of occupancy which... may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.") (emphasis added); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941) ("The power of Congress [to extinguish Indian title based on aboriginal possession] is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues.").

("The Indian Claims Commission Act was a congressional program of limited retrospective compensation for extinguishment of Indian title."). The work of the Indian Claims Commission does not apply to the present Hopi claim for several reasons. First, the Commission did not deal with claims for land, since it was authorized *only* to dispense money and was *not* empowered to return the tribes' aboriginal lands to them.[14] Second, compensation was not disbursed to compensate *legal* claims, but was a matter of "grace," appealing to the conscience of the government to right the "moral" wrongs that occurred in the course of hundreds of years of dealings with the indigenous inhabitants of this land.[15] Accordingly, the Commission developed and applied a very generous standard to compensate for those moral wrongs. Third, the Commission dealt only with claims against the federal government, not claims between Indian tribes. Finally, as the court of appeals properly noted:

> The line of cases on which the Hopis rely to construe the phrase "possession, occupation, or use" began twelve years after the 1934 Act was passed. Congress could not have meant to use a meaning not yet given to a phrase it did not use, when it wrote "located" into the 1934 statute.

[Pet. App. 12a]

---

[14] *See Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1461 (10th Cir. 1987) (the only relief available from the Indian Claims Commission is money: "No lands would be returned to a tribe.").

[15] *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281-282 (1955) ("Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability."); Margaret H. Pierce, *The Work of the Indian Claims Commission*, 63 A.B.A.J. 227, 229 (1977) (such claims for monetary recompense were not based on law, but were "'moral claims' appealing to the conscience of the government to right wrongs occurring in the course of its dealings with the Indian tribes.").

Indeed, the Hopi Tribe had no choice but to disclaim any reliance on aboriginal title. Before this case was filed, the Indian Claims Commission decided (and the Court of Claims later affirmed) that creation of the Hopi Reservation in 1882 extinguished any aboriginal title claim the Hopi Tribe may have had to land outside that reservation. [Pet. App. 273a-275a][16] In fact, the Hopi Tribe has been compensated under the Indian Claims Commission Act for the taking of its aboriginal lands outside the 1882 reservation, so any attempt by the Hopi Tribe to obtain land on the basis of "aboriginal title" would be an improper second bite at the apple, which the lower courts properly rejected. [Pet. App. 45a ("The Hopi Tribe may not have a second chance at establishing its claims of aboriginal title.")]

Even if the Hopi Tribe had not clearly admitted that its claim herein is solely based on "recognized title" and governed by the language of the 1934 Act, the Hopi argument for dragging the "aboriginal title" doctrine into this case would fail. The Hopi Tribe has never adequately explained how the teachings of the Indian Claims Commission—which was not even established until 1946—supposedly became grafted onto the 1934 Act. The only support the Hopi Tribe now offers is a misreading of the legislative history of the 1934 Act. The Hopi Tribe states that the Indian Office reassured the Hopi Tribe that the 1934 Act "would not diminish their historic occupancy rights." [Pet. 4] Agents from the precursor of today's Bureau of Indian Affairs did conduct meetings in Hopi villages at which the proposed legislation was explained. *A Proposed Bill to*

---

[16] *Hopi Tribe v. United States*, 23 Ind. Cl. Comm. 277, 284-85 (1970) ("[T]he December 16, 1882 Presidential Order effectively terminated and put to rest all Hopi aboriginal title claims beyond the limits of the 1882 Hopi Executive Order Reservation."), *reh'g denied*, 31 Ind. Cl. Comm. 16, 23, 28, *aff'd*, No. 13-74 (Ct. Cl. January 31, 1976).

Define the Exterior Boundaries of the Navajo Reservation in Arizona: Hearing Before the Senate Comm. on Indian Affairs, 72d Cong., 2d Sess. 29 (1932). At those meetings, however, government representatives consistently explained that the purpose of the Act was to define the boundaries of the Navajo Reservation, and to the extent the legislation would affect the Hopis at all, it would "protect the rights of the Hopi Indians to the lands they occupy around here" [*id.* at 34, 39] and "protect their [Hopi] rights to the lands they are now using and occupying" [*id.* at 68]. Nothing in the legislative history of the 1934 Act suggests that Congress intended to incorporate an "aboriginal title" standard for determining where the Hopis were "located" in 1934, nor is there even a hint that Congress intended to give the Hopis an interest in 3 million acres.

The Hopi Tribe argues that the same standards should apply to both aboriginal title and recognized title [Pet. 10], but that is not the law and the cases cited in the Hopi petition do not support that argument. For example, the excerpt cited from *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835), was merely an observation about the protection accorded under English and Spanish law to tribes whose lands had been acquired by those conquering nations. *Id.* at 745-46. *Mitchel* did not address conflicting land claims of two tribes or a congressional grant to an Indian tribe. It instead acknowledged that under English and Spanish law, "Indian title" was a mere "right of possession" freely extinguishable by the crown.

In short, whether the Hopi people may once have held "aboriginal title" to a portion of what is now the Navajo Reservation is beside the point. The Hopi Tribe's "aboriginal" rights were *extinguished* in 1882 when the United States established the Hopi Reservation, and the Hopi Tribe's *only* possible claim to any portion of the Navajo Reservation is through "recognized title" arising from the "other Indians" language in the 1934 Act.

2. The decision of the district court in *Healing v. Jones* does not support the Hopi argument.

The Hopi Tribe asserts that the decision in *Healing v. Jones* supports its aboriginal title theory [Pet. 4-5], but it misconstrues the *Healing* decision. As a threshold matter, *Healing* is not a valid precedent because that case construed and applied the 1882 executive order, which used different language than that of the 1934 Act.[17]

But even if the *Healing* case were germane, that decision did *not* apply the "aboriginal title" standard now urged by the Hopi Tribe. To the contrary, the court in *Healing* held that the Navajo Nation could obtain an interest in the 1882 reservation only if Navajo people had "used and occupied the reservation, in Indian fashion, *as their continuing and permanent area of residence.*" *Healing*, 210 F. Supp. at 144 (emphasis added).

The Hopi Tribe implies that *Healing* awarded lands to the Navajo Nation based on sporadic grazing and intermittent hunting or gathering, but nothing supports that implication. [Pet. 7, 12] The test adopted in *Healing* required the Navajo to prove that they used the lands as their "continuing and permanent area of residence" *and* the court specifically stated that its ruling was based on the Navajo's *residential* use of the entire area awarded. After discussing the dramatic recovery of the

---

[17] The 1882 executive order used the verb "settle," as to which the Navajo Nation suggested the following meaning: "Indians other than the Hopis are to be regarded as settled in the reservation... if they use and occupy such lands for residential and incidental purposes, in Indian fashion, *and* if such use and occupancy is of a continuing and permanent nature as opposed to a transitory or temporary occupancy." *Healing*, 210 F. Supp. at 143 (emphasis added). Thus, the standard suggested by the Navajo Nation in *Healing* is remarkably like the standard applied by the district court and court of appeals in this case, but in the final analysis the court rejected the Navajo suggestion and applied its own, more restrictive standard in *Healing*.

Navajo population after the internment of most of the Navajo people at Fort Sumner, New Mexico, in the 1860s [*Healing*, 210 F. Supp. at 135], the district court concluded:

> The use and occupancy of the reservation area for *residential purposes* by a constantly increasing number of Navajos, is therefore *definitely established*, and we have so found.

Id. at 145 (emphasis added). Nothing in *Healing* suggests (nor has the Hopi Tribe cited any evidence to indicate) that the court in *Healing* relied on Navajo hunting, gathering or other such transitory activities to establish where Navajos were "settled." The Hopi Tribe is simply incorrect when it argues that the standard applied by the district court and court of appeals in this case is inconsistent with, more stringent than, or precluded by, the *Healing* decision.

3. The lower courts properly applied the plain meaning of the 1934 Act.

The Hopi Tribe claims that the court of appeals ignored the plain meaning of the 1934 Act.[18] On the contrary, the court of appeals attributed the commonly understood meaning to the statutory term "located," explaining that it "was not a term of art connoting lands which people merely passed over occasionally or otherwise used to a very low level of intensity." [Pet. App. 10a][19] Furthermore, the court of appeals found that

---

[18] Curiously, the Hopi Tribe at the same time argues that the plain meaning of the 1934 Act was *not* the proper construction: "There is more to the case than the interpretation of a single word." [Pet. 9]

[19] The court of appeals' definition is consistent with the plain meaning of the word in 1934. *See, e.g.*, WEBSTER'S NEW INT'L DICTIONARY 1266 (continued...)

the district court's construction was consistent with the appellate court's 1980 holding in this litigation and was "well designed to serve the purpose of the 1934 Act." [Pet. App. 10a] The primary purpose of the 1934 Act was to define a *Navajo* reservation and only secondarily to allow Hopis to remain where they were located at the village of Moenkopi. [Pet. App. 256a] As the court of appeals stated in its earlier decision:

> The purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis. We agree with the district court that this is the meaning of the "such other Indians as may already be located thereon" provision.

[Pet. App. 260a] Thus, the lower courts' construction of the 1934 Act is consistent with the only applicable court of appeals authority, and there is no conflict that justifies the intervention of this Court.

The Hopi Tribe also argues that the rulings below were incorrect because they were "unnecessary," suggesting (without explanation) that the courts could have considered an option such as eminent domain. However, in 1974, Congress elected not to exercise the government's power of eminent domain but instead to authorize the Navajo Nation and the Hopi Tribe to

---

[19] (...continued)
(1930) (Locate: "To set or establish in a particular spot or position; to settle; station; place." Location: "Situation; place; locality; specif[ically] place of residence or settlement; as, to have a desirable *location*"); NEW CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 970 (1927) (Locate: "To set, fix, or establish in a place, situation, or locality...; place; settle [t]o establish one's self in a place... [t]he act of locating, or the state of being located; position, situation, or settlement in a place; hence, a place or situation occupied").

resolve their differences through litigation.[20] The litigants have since followed the path chosen for them by Congress, and it is not the province of the courts to second-guess whether Congress might have specified a different course.

4. The final judgment of the district court was fair, equitable, just, and consistent with the plain meaning of the 1974 Act.

The 1974 Act requires that "[a]ny lands in which the Navajo and Hopi Tribes...are determined to have a joint or undivided interest shall be partitioned by the District Court *on the basis of fairness and equity*..." (emphasis added). [Pet. App. 301a] "Fairness and equity" depend solely on the facts of this case. Certiorari is not an appropriate vehicle to review a trial court's findings of fact, especially when they already have been reviewed and affirmed by a court of appeals.[21] Even if this court were inclined to wrestle with the myriad facts that can and should affect "fairness and equity," no amount of time spent reviewing the cold record could approach the level of the district court's understanding of the lives of the Navajo and Hopi people. The district court visited the disputed lands, saw Navajo and Hopi homes, became intimately familiar with Navajo and Hopi beliefs and lifestyles, heard from lay and expert

---

[20] On November 23, 1974, four United States Senators wrote to the other Senators during Congress's consideration of the 1974 Act, expressing concern that an arbitrary division of the land between the two tribes would result in a takings claim against the government. [Ex. 5272]

[21] *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."); *Graver Tank Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

witnesses and studied voluminous exhibits, and then made exhaustive findings of fact to support its decision that the partitioning was fair and equitable. In the final analysis, the district court awarded the Hopi Tribe all lands "used in any significant way by the Hopis in 1934" and "all areas currently used" by the Hopis. [Pet. App. 203a]

The partition line adjudicated by the district court does not require any family—Navajo or Hopi—to be removed from its home. The Hopi Tribe does not like that result and considers it to be unfair. Incredibly, the Hopi Tribe accuses the district court of being "unprincipled" because it supposedly sought "to avoid any possibility of relocation." [Pet. 13] Apparently the Hopi Tribe believes the district court should have welcomed the opportunity to precipitate the ugly spectacle of federal marshals dragging people from their homes. The Hopi argument appears to be that the statutory mandate to partition the land on the basis of "fairness and equity" prohibited the district court from attempting to minimize such human suffering.

Avoidance of relocation is particularly fair and equitable in the case of the Hopi claim to sites where its members merely engaged in sporadic "traditional uses" such as hunting and gathering, since the Hopi Tribe is, in effect, arguing that Navajo families should be forced from their homes if any Hopi individual wandered past the Navajo homes while picking herbs or chasing rabbits sixty years ago. The district court should be commended, not criticized, for rejecting such a cynical and overreaching claim and for following the statutory mandate of "fairness and equity" in a manner that permits both the Navajo and Hopi people to remain where they are.

CONCLUSION

The Hopi Tribe's petition for a writ of certiorari should be denied.

Respectfully submitted,

TERRY E. FENZL
Counsel of Record
CRAIG W. SOLAND
JOHN W. ROGERS
SHIRLEY A. KAUFMAN
BROWN & BAIN, P.A.
Post Office Box 400
Phoenix, Arizona 85001-0400
(602) 351-8000

HERB YAZZIE
ATTORNEY GENERAL
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, Arizona 86515
(602) 871-6343
Of Counsel